UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1373, 81-1374,
81-2996 and 81-3067

MARY C. SMITH, CAROL R. DIMAIO AND HOWARD E. WATTS, JR.

vs.

JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation
(D.C. Civil No. 75-0964)

MARY C. SMITH

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 77-1303)

Howard E. Watts, Jr., plaintiff in
D.C. Civil No. 75-0964,

Appellant in No. 81-1373

MARY C. SMITH, CAROL R. DIMAIO AND HOWARD E. WATTS, JR.

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 75-0964)

MARY C. SMITH

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 77-1303)

JOSEPH HORNE COMPANY, INC., defendant in D.C. Civil No. 75-0964,

Appellant in No. 81-1374

MARY C. SMITH, CAROL R. DIMAIO AND HOWARD E. WATTS, JR.

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 75-0964)

MARY C. SMITH

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 77-1303

JOSEPH HORNE COMPANY, INC., defendant in D.C. Civil No. 75-0964,

Appellant in 81-2996

MARY C. SMITH, CAROL R. DIMAIO AND HOWARD E. WATTS, JR.

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 75-0964)

MARY C SMITH

vs.

JOSEPH HORNE COMPANY INC., a Pennsylvania corporation
(D.C. Civil No. 77-1303)

Howard E. Watts, Jr., plaintiff in D.C. Civil No. 75-0964,

Appellant in No. 81-3067

Appeal from the United States District Court for the Western District of Pennsylvania - Pittsburgh

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Submitted Under Third Circuit Rule 12(6)
August 4, 1982
Before: ALDISERT and WEIS, Circuit Judges, and RE, Chief Judge.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant and cross-appellant, and for the reasons set forth in the district court opinion by the Honorable Alan N. Bloch, Smith v. Joseph Horne Co., Civ. Nos. 75-964, 77-1303 (W.D.Pa. Oct. 1, 1980); it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Parties to bear their own costs.

BY THE COURT,

s/ Aldisert
Circuit Judge

Attest:

s/Sally Mrvos
Sally Mrvos, Clerk

DATED: Aug. 4 - 1982

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-1373/74,
81-2996 & 81-3067

MARY C. SMITH, et al.

vs.

JOSEPH HORNE COMPANY, INC.,
et al.

(W.D. Pa. - Pgh. - Civil Nos.
75-0964, 77-1303)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM, SLOVITER and BECKER,
Circuit Judges, and RE, Chief Judge.*

The petition for rehearing filed by

Howard E. Watts, Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Aldisert
Judge

Dated: Aug. 24, 1982

* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MARY C. SMITH, CAROL R. DIMAIO, and HOWARD E. WATTS, JR.,	)	
Plaintiffs,	)	
vs.	)	Civil Action Nos. 75-964 77-1303
JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation,	)	
Defendant.	)	

FINDINGS OF FACT

1. Plaintiffs Smith, DiMaio, and Watts are all individuals who reside in the Western District of Pennsylvania.

2. Defendant Joseph Horne Company is a Pennsylvania corporation engaged in an industry affecting commerce, to wit: retail merchandising, and has employed fifteen or more employees for each working day in each of twenty or more calendar weeks in the current and

preceding years.

3. Plaintiffs Smith and DiMaio filed charges with the Equal Employment Opportunity Commission (EEOC) on June 29, 1972, alleging they did the same work as plaintiff Watts but were paid less by Defendant Horne's.

4. Plaintiff Smith filed additional charges with the EEOC on July 8, 1972, alleging that Plaintiff Watts had been laid off by Defendant Horne's in retaliation for their original charges.

5. Plaintiff DiMaio filed additional charges with the EEOC on July 15, 1972, alleging the same thing.

6. Plaintiff Watts filed a charge with the EEOC on July 11, 1972, alleging he had been laid off by Defendant Horne's in retaliation for the Smith and DiMaio charges.

7. Plaintiff Smith filed a third

charge with the EEOC on February 18, 1975, alleging harrassment by Defendant Horne's in further retaliation for her earlier charges.

8. The EEOC granted Plaintiffs Smith, DiMaio and Watts right to sue letters with respect to all charges filed in 1972 on June 10, 1975. The suit at Civil Action No. 75-964 was filed within 90 days thereafter. The EEOC granted Plaintiff Smith a right to sue letter with respect to her 1975 charge of retaliation on May 18, 1976. Plaintiff Smith moved to amend her complaint at Civil Action No. 75-964 to include her retaliation charge within 90 days thereafter. However, the Court denied the motion to amend the complaint and a motion to reconsider. Plaintiff Smith thereafter timely filed a second suit at Civil Action No. 77-1303 alleging

retaliation.

9. Defendant Horne's principal place of business is located at 501 Penn Avenue, Pittsburgh, Pennsylvania. This location is referred to as the Downtown or Main Store. Defendant Horne's also has numerous branch stores in locations surrounding Pittsburgh.

10. Plaintiff DiMaio was first employed as a wig stylist by the Defendant Horne's in the Wig and Millinery Department of the Downtown Store on February 2, 1970.

11. Plaintiff Smith was first employed as a wig stylist by the Defendant Horne's at one of its branch stores on July 9, 1965. She was transferred to the Wig and Millinery Department in Horne's Downtown Store on February 9, 1970.

12. Plaintiff Watts was first

employed as a wig stylist by the Defendant Horne's in the Wig and Millinery Department of the Downtown Store on March 24, 1970.

13. At the time of her hiring, the Plaintiff DiMaio had an Ohio beauty operator's license representing 1,250 hours of training. She also had had 900 hours of training toward her Ohio teacher's license. She was also able to cut and style raw wigs. Prior to her hiring by Horne's, the Plaintiff DiMaio had worked for several years as a wig stylist in the wig department of the Strauss-Hirschberger department store in Youngstown, Ohio. Her duties at that store were to fit and style wigs and to conduct promotional demonstrations of wig styling. Plaintiff DiMaio also worked briefly as a wig stylist at Kaufmann's in Pittsburgh prior to going to Horne's.

14. At the time of her hiring, the Plaintiff Smith had a Pennsylvania beauty operator's license representing 1,000 hours of training. She had also taken a 160-hour advanced hair styling course, and a 160-hour advanced hair coloring course. She was also able to cut and style raw wigs and do blending. Prior to her transfer to Horne's Downtown Store, the Plaintiff Smith had worked at the Horne's South Hills Store as a wig stylist. Her duties at that store were to fit and style wigs and to conduct promotional demonstrations of wig styling.

15. At the time of his hiring, the Plaintiff Watts had a Pennsylvania beauty operator's license representing 1,000 hours of training. He also had a Pennsylvania teacher's license representing 500 hours of training. He was not able to cut and style raw wigs or do blending.

Prior to his hiring by Horne's, he had worked for several years for Abbott Tresses, a wig manufacturer, as a wig stylist whose primary duty was to conduct promotional demonstrations of wig styling.

16. Raw wigs, as opposed to pre-styled wigs, are not ready to wear, but must be cut and styled to the customer's specifications. A pre-styled wig is already cut and styled, but may need further cutting and styling to meet the customer's needs.

17. Cutting and styling raw wigs requires more effort and skill than does the styling of pre-cut and pre-styled wigs.

18. Blending is a process by which different colors of hair fiber are put together to make a natural-looking partial wig or wiglet.

19. At the time she was hired by

the Defendant Horne's, Plaintiff DiMaio was paid $1.95 per hour. On March 24, 1970, she received a raise to $2.050 per hour; on August 30, 1970, she received a raise to $2.100 per hour; on February 15, 1971, she received a raise to $2.510 per hour; on February 14, 1972, she received a raise to $2.640 per hour; on February 13, 1973, she received a raise to $2.740 per hour; on February 18, 1974, she received a raise to $2.840 per hour; on February 15, 1975; she received a raise to $2.940 per hour; on February 16, 1976, she received a raise to $3.190 per hour; on February 14, 1977, she received a raise to $3.390 per hour; on February 13, 1978, she received a raise to $3.590 per hour; and on February 11, 1979, she received a raise to $3.890 per hour.

20. At the time of her transfer to

the Defendant Horne's Downtown Store, Plaintiff Smith was paid $2.29 per hour. On March 30, 1970, she received a raise to $2.38 per hour; on February 15, 1971, she received a raise to $2.51 per hour; on February 14, 1972, she received a raise to $2.64 per hour; on February 17, 1973, she received a raise to $2.74 per hour; on February 18, 1974, she received a raise to $2.84 per hour; and on February 17, 1975, she received a raise to $2.94 per hour.

21. At the time he was hired by the Defendant Horne's, Plaintiff Watts was paid $2.875 per hour. On April 14, 1970, he received a raise to $3.25; on February 15, 1971, he received a raise to $3.38 per hour; and on February 14, 1972, he received a raise to $3.51 per hour.

22. During her employment with the

Defendant Horne's, the Plaintiff DiMaio's duties were to fit and style pre-cut and pre-styled wigs; to fit and style raw wigs; to sell wigs and wig accessories; to assist salespersons by cutting and styling wigs they were attempting to sell or had sold; to blend new hair pieces; to participate in promotional demonstrations; to take inventory; and to help train new personnel in the department.

23. During her employment with the Defendant Horne's, the Plaintiff Smith's duties were to fit and style pre-cut and pre-styled wigs; to fit and style raw wigs; to sell wigs and wig accessories; to assist salespersons by cutting and styling wigs they were attempting to sell or had sold; to blend new hair pieces; to participate in promotional demonstrations; to take inventory; and

to train new personnel in the department.

24. During his employment with the Defendant Horne's, the Plaintiff Watts' duties were to fit and style pre-cut and pre-styled wigs; to fit and style raw wigs; to sell wigs; to assist salespersons by cutting and styling wigs they were attempting to sell or had sold; to participate in promotional demonstrations; to take inventory; and to train new personnel in the department. In addition, from the time of his hiring until September, 1971, the Plaintiff Watts made frequent trips to Horne's branch stores to perform promotional demonstrations, train personnel and check and transfer inventory.

25. A promotional demonstration consisted of styling a wig for a customer in view of the general public. These demonstrations were sometimes preceded

by newspaper advertisements.

26. Only Plaintiff Watts was ever mentioned by name in a newspaper advertisement for a promotional demonstration.

27. In 1971 and 1972, sales of wigs declined steadily at Horne's. Net sales for Horne's Wig and Millinery Department at all stores declined from $376,771 in 1970 to $237,458 in 1971 and to $198,699 in 1972, representing a 37% percent drop in 1971 and a 16.3% drop in 1972. Net sales for the Wig and Millinery Department in the Downtown Store declined from $275,007 in 1970, to $190,040 in 1971, and to $153,090 in 1972 representing a 30.9% drop in 1971, and a 19.4% drop in 1972.

28. Local 1407 of the Retail Store Employees Union represented all employees in the Horne's Wig and Millinery

Department, except supervisory personnel.

29. On June 6, 1972, Russell Klaypach, the business agent of Local 1407, approached Robert Neal, then Horne's labor relations manager, and asked him to increase Smith's and DiMaio's wages to equal the wages of Watts.

30. On June 12, 1972, Watts was asked to come to the office of Robert Rieland, then Defendant's General Merchandise Manager, and Rieland indicated displeasure with Watts' low sales and with other aspects of Watts' performance.

31. Wig stylists made sales of their own and often spent considerable time in styling wigs for salespersons, who would then get credit for the sales.

32. On June 26, 1972, Klaypach had lunch with Neal and Neal remarked to Klaypach that if Watts was not an employee of the Wig and Millinery Department,

Horne's would not have a problem.

33. On July 6, 1972, Dorys Klein, the only "extra" wig stylist in the Wig and Millinery Department was laid off from that Department.

34. An "extra" employee at Horne's is not a full-time, regular employee, but rather, works only when needed.

35. The collective bargaining agreement between Horne's and Local 1407 provided that in cases of lay-offs due to a reduction in force, all "extra" employee in a department must be laid off before any regular employees. After all "extra" employees are laid off, regular employees are laid off according to seniority, those with the least seniority being laid off first.

36. On July 8, 1972, Plaintiff Watts was laid off from the Wig and Millinery Department by the Defendant

Horne's.

37. At the time of Watts' lay-off, Watts was the least senior member of the Wig and Millinery Department at the Downtown Store.

38. Wig sales continued to decline throughout 1973, 1974 and 1975.

39. On February 3, 1975, Plaintiff Smith was laid off from the Wig and Millinery Department at the Downtown Store.

40. At that time, Smith was the least senior member of the Department.

41. After her lay-off on February 3, 1975, Smith was temporarily transferred to various other departments in the Downtown Store.

42. Effective August 9, 1975, Smith voluntarily resigned from Horne's to take another job.

43. Effective November 1, 1979,

DiMaio voluntarily resigned from Horne's.

44. Had the Plaintiff DiMaio, during the course of her employment with the Defendant Horne's, received the same wages as the Plaintiff Watts did receive and would have received had he continued as an employee of Horne's as long as DiMaio, she would have received $21,461.00 more than she did receive.

45. Six percent interest computed each year until time of trial on the wage differential is $8,807.32.

46. Had the the Plaintiff Smith, during the course of her employment with the Defendant Horne's, received the same wages as the Plaintiff Watts did receive and would have received had he continued as an employee of Horne's as long as Smith, she would have recieved $11,706.60 more than she did receive.

47. Six percent interest computed

each year until time of trial on the wage differential is $5,585.92.

Date: 10/1/80

s/ Alan N. Bloch
United States District Judge

cc: Arnold Friedman, Esquire
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IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MARY C. SMITH, CAROL R. DIMAIO, and HOWARD E. WATTS, JR.,	)	
Plaintiffs,	)	
vs.	)	Civil Action Nos. 75-964 77-1303
JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation,	)	
Defendant.	)	

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this suit pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 USC, Section 2000e.

2. During the course of their employment by the Defendant Joseph Horne Company, Plaintiffs Smith and DiMaio performed substantially similar work as Plaintiff Watts, requiring substantially

the same skill, effort and responsibility.

3. Defendant Joseph Horne Company discriminated against Plaintiffs Smith and DiMaio on the basis of their sex in violation of Title VII of the Civil Rights Act of 1964, 42 USC, Section 2000e.

4. Plaintiff Watts made out a prima facie case of a retaliatory firing and discrimination on the basis of sex by presenting evidence that shortly before he was laid off, the Defendant Horne's threatened to lay him off because Plaintiffs Smith and DiMaio filed charges with the EEOC alleging they were not paid equally with him.

5. However, Plaintiff Watts did not carry his burden of persuasion in the face of evidence presented by the Defendant Horne's of greatly declining wig sales and contractual obligations to

reduce the work force in order of seniority.

6. Defendant Joseph Horne Company did not discriminate against Plaintiff Watts either because of his sex or in retaliation for the EEOC charges of Smith and DiMaio.

7. Plaintiff Smith made out a prima facie case of retaliatory harrassment and constructive firing by presenting evidence that she was laid off from the Wig and Millinery Department and thereafter assigned to numerous different departments until she resigned.

8. However, Plaintiff Smith did not carry her burden of persuasion in the face of evidence presented by the Defendant Horne's of a continuing decline in wig sales and contractual obligations to reduce the work force in order of seniority.

9. Defendant Joseph Horne Company did not discriminate against Plaintiff Smith in retaliation for her filing of charges with the EEOC.

WHEREFORE, judgment be and hereby is entered in Civil Action No. 75-964 for the Plaintiff, Carol R. DiMaio, in the amount of $30,268.32, representing the amount of additional wages she would have received during the course of her employment with Horne's but for the discrimination of the Defendant and interest to date of trial, and against the Defendant, Joseph Horne Company, Inc.

Further, judgment be and hereby is entered in Civil Action No. 75-964 for the Plaintiff, Mary C. Smith, in the amount of $17,292.52, representing the amount of additional wages she would have received during the course of her

employment with Horne's but for the discrimination of the Defendant and interest to date of trial, and against the Defendant, Joseph Horne Company, Inc.

Further, judgment be and hereby is entered in Civil Action No. 75-964 against the Plaintiff, Howard E. Watts, Jr., and for the Defendant, Joseph Horne Company, Inc.

Further, judgment be and hereby is entered in Civil Action No. 77-1303 against the Plaintiff, Mary C. Smith, and for the Defendant, Joseph Horne Company, Inc.

Date: 10/1/80

s/ Alan N. Bloch
United States District Judge

cc: Arnold M. Friedman, Esquire
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IN THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

MARY C. SMITH, CAROL R. DIMAIO, and HOWARD E. WATTS, JR., Plaintiffs, vs. JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation, Defendant.	Civil Action No. 75-964
MARY C. SMITH, Plaintiff vs. JOSEPH HORNE COMPANY, INC., a Pennsylvania corporation, Defendant	Civil Action No. 77-1303

ORDER

AND NOW, this 22nd day of January, 1981, upon consideration of Plaintiffs' Motion to Amend and Supplement Findings of Fact and Conclusions of Law filed in

the above captioned matter on October 14, 1980,

IT IS HEREBY ORDERED that the amendment of Finding of Fact No. 30 is GRANTED and that Finding of Fact No. 30 be and hereby is amended to read:

> 30. On June 10, 1972, Watts was asked to come to the office of Robert Rieland, then Defendant's General Merchandise Manager, and Reiland indicated displeasure with Watts' low sales and with other aspects of Watts' performance.

IT IS FURTHER ORDERED that the amendment of Finding of Fact No. 24 and Plaintiffs' Motion to make Supplemental Findings of Facts and Conclusions of Law are DENIED.

s/ Alan N. Bloch
United States District Judge

cc: Arnold M. Friedman, Esquire
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